IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.2387 OF 2005

IN

NOTICE OF MOTION NO.2764 OF 2004

IN

SUIT NO.178 OF 2001

...

M/s.Mittal Capitals (India) Ltd....Plaintiff

v/s.

M/s.Sippy Films & ors. ...Defendants

...

Mr.G.N.Pandit for the Plaintiff.

Mr.A.G.Damle for the Defendants.

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CORAM: D.K.DESHMUKH, J.

DATED: 23RD MARCH,2007

P.C.:

1. This Notice of Motion is taken out by the Defendants Nos. 1, 3, 5, 10 & 11 for setting aside the order dated 4-8-2005 dismissing the Notice of Motion No.2746 of 2004 and for restoration of Notice of Motion No.2746 of 2004.

2. I have heard the learned Counsel appearing for the Defendants who have taken out this Notice of Motion. In my opinion, this is a classic case of abusing the process of court and the lawyer helping the client in abusing the process of the court. Plaintiff M/s.Mittal Capitals (India) Ltd. filed Summary Suit No.178 of 2001 seeking money decree against the Defendants. After the Defendants were served with the writ of summons, summons for judgment No.738 of 2001 was taken out. Perusal of the order dated 28-1-2003 passed in Summons for Judgment No.738 of 2001 shows that Mr.Abhishek Khare, advocate was appearing for the Defendants who have taken out this Notice of Motion. The court noted that the Defendants who have taken out this Notice of Motion

did not make any application for leave to defend. They have also not filed any affidavit disclosing the grounds which would entitle them to leave to defend. In the absence of any application for leave to defend the court following the provisions of Order 37 of CPC granted summons for judgment and passed decree in terms of prayer clause of the suit against the Defendants Nos. 1 to 6 and 9 to 11.

3. Notice of Motion No.2764 of 2004 was taken out by Defendants Nos. 1 to 3, 5, 10 & 11. The only reason that was given in the affidavit filed in support of that Notice of Motion for not filing an application for leave to defend was that the advocate on whom the summons for judgment was served did not inform the Defendants about the service of summons for judgment and the advocate did not file any reply. What is pertinent to note is that the Defendant claim that they came to know about the passing of exparte decree on 7-9-2004. But they did not even state that after coming to know that the exparte decree has been passed because they did not file any application for leave to defend they approached the lawyer for finding out from him as to why he did not intimate to them that summons for judgment has been served. They

have not issued any notice to the advocate, who according to them did not intimate them about the receipt of the summons for judgment. That advocate was also not joined as a party to the Notice of Motion. Therefore, only reason given in the affidavit filed in support of the motion for not filing an application for leave to defend is incapable of being accepted by any court in the absence of the Defendants giving any notice to the advocate and without joining him as a party to the Notice of Motion. Because that Notice of Motion could have been granted only on recording a finding that the advocate engaged by the Defendants is guilty of dereliction of his duties. To say the least, the conduct of the Defendant of making allegation against the advocate without giving that advocate an opportunity of explaining his conduct was irresponsible. It was pointed out by the advocate appearing for the Plaintiff that the claim made in the affidavit that the Defendants came to know of the decree passed against them only on 7-9-2004 is also untrue and false because before the decree was drawn the Plaintiff’s advocate has served a notice on the Defendants dated 7-11-2003 informing them of the decree. Perusal of the record of Notice of Motion

No.2764 of 2004 shows that when the motion was before the court on 23-2-2005, none appeared for the Defendants. Therefore, motion was dismissed for default. On the next date i.e. on 24-2-2005 by consent of parties, motion was restored. When the motion came before the court on 21-7-2005, the learned Counsel appearing for both sides stated before the court that the matter has been settled and the court recorded the statement made by the Counsel appearing for the Defendants i.e. "The learned Counsel for the Defendant states that the Defendant is agreed to pay the amount. S.O. one week for filing consent terms." Matter then appeared before the court on 4-8-2005. None appeared for the Defendants, though the advocate for the Plaintiff was present. The Court, therefore, dismissed the Notice of Motion.

4. The present Notice of Motion has been taken out for restoration of that motion. In the affidavit filed in support of this motion, an absolutely wrong statement has been made in paragraph 2 that the Notice of Motion was on board for hearing on 15-7-2005, when there was talk of settlement between the parties and hence the matter was adjourned for

two weeks. Then it is stated that the said Notice of Motion was shown in the caption of settlement and because the lawyer for the Defendant was held up in some other court the motion was dismissed of default. Then in paragraph 3 is stated that "I say that since 27-7-2005 due to heavy rains nobody was attending our office till 2-8-2005 and hence no decision could be taken on the issue of settlement of the above matter. I say that after the Order dated 4-8-2005, my advocate received letter dated 6-8-2005 from the Advocate for the Plaintiff and the same is replied by my advocate by reply dated 10-8-2005. I say that above letter dated 10-8-2005 will show that Defendants are desirous of settling the dispute."

5. Perusal of above stated paragraph shows that according to Defendants in August, 2005 the matter was not settled. This is contrary to the statement made by the advocate for the Defendants before the Court on 21-7-2005, which is quoted above. It is clear that the order dated 21-7-2005 is suppressed and totally different version is disclosed in the affidavit. Though it is claimed that the advocate did not appear because he was busy in some other court, there is no document produced to show that the

lawyer was actually busy in some other court. Affidavit of the lawyer concerned is not filed. There is no explanation why the Defendants did not remain present before the court. It is, thus, clear that the Defendants have been abusing the process of the court since inception. They have never been truthful to the court. In my opinion, therefore, the Defendants are not entitled to have their Notice of Motion restored because of their conduct as also for the reason that even restoration of their Notice of Motion will not serve any purpose, because that Notice of Motion is incapable of being granted, because grant of that Notice of Motion would amount to condemn the lawyer unheard.

6. Taking overall view of the matter,therefore, Notice of Motion is liable to be disposed of. However, as I find that the Defendants have been guilty of abusing process of the court, as a result of which the Plaintiff was required to appear in court repeatedly, decree secured by the Plaintiff remained unexecutable, exemplary costs have to be imposed on the Defendants for taking out this Notice of Motion. Notice of Motion is, therefore, disposed of. Defendants are directed to pay as and by way of

costs Rs.15,000/- to the Plaintiff

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